88-1894

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

IN RE JAY LOUIS GIBSON AND
ALLEN N. BRUNWASSER,

Petitioners,

and

UNITED STATES OF AMERICA
EX REL JAY LOUIS GIBSON
1013 ALQUIN STREET
McKEESPORT, PA
(412) 391-0329

Petitioners,

vs.

DARREN WOLPERT, D.E.A.
EAST BUILDING, NEAR
THE NATIONAL AIRPORT,
WASHINGTON, D.C.

Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALLEN N. BRUNWASSER,
Attorney for Petitioner
P.O. Box 22212
Pittsburgh, PA 15222
(412) 391-0329

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Do the Fifth and Sixth Amendments to the United States Constitution prohibit sua sponte removal of a previously unconditionally admitted out of state attorney without pre-decision notice or hearing when his also out of state criminal client has retained local counsel for emergency and short-notice proceedings and both lawyer and client object and, if not, should counsel's said removal be reversed by authority of the United States Supreme Court's supervisory power?

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Jay Louis Gibson and Allen N. Brunwasser respectfully present this petition for allowance of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

Petitioners can find no reported decisions in these cases.

All District Court opinions were filed in the District Court at either C.R. #87-311 and/or C.A. #87-1821.

The Court of Appeals filed no opinions but its relevant orders are photographed in the Appendix to this Petition.

JURISDICTION

The judgments sought to be reviewed are the January 17, 1989 dated and filed panel decisions of the United States Court of Appeals for the District of Columbia Circuit entered on January 17, 1989 at #88-5002 (16-A) and at #88-5023 (36-A).

Timely January 30, 1989 Petitions for rehearing and suggestions of rehearing en banc were all denied on March 15, 1989 at #88-5002 (38-A, 39-A) and at #88-5023 (40-A, 41-A).

Jurisdiction to petition for certiorari is founded upon 28 USC 1254(1).

Petitioners' motion to extend the 60-day, Rule 20.1, time to file their petition for certiorari in #88-5002 (a criminal case) so it would be equal to the 90 days allowed for the civil habeas corpus at #88-5023 was ___.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Fifth Amendment to the United States Constitution.

"No person shall be deprived of life, liberty or property, without due process of law."

Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right – and to have the assistance of counsel for his defense."

Rule 104 of the United States District Court for the District of Columbia.

RULE 104 "PRACTICE BY ATTORNEYS

(a) Practice by resident members of the bar of this court. An attorney who is a member in good standing of the bar of this court may appear, file papers and practice in this court if the attorney either (i) maintains an office for the practice of law within the District of Columbia, or (ii) maintains an office in Maryland and has complied with the Local Rules of the United States District Court for the District of Maryland relating to certification of trial experience.

(b) Nonresident counsel, an attorney who is a member in good standing of the bar of any United States Court or of the highest court of any state, but who does not qualify under the requirements of subsection (a), may file papers in this court only if such attorney joins of record a member of the bar of this court who meets the requirements of subsection (a) an attorney who meets the requirements of subsection (a) above at the time of the entry of an appearance, but whose office is thereafter removed to a location outside the District of Columbia shall at that time join of record in all cases in which an appearance is entered an attorney who meets the requirements of subsection (a).

(c) Signatures of resident counsel required. All papers submitted by nonresident counsel must be signed by nonresident counsel and by an attorney who meets the requirements of subsection (a).

(d) Participation by nonresident counsel in court proceedings. An attorney who fails to qualify under subsection (a) above may be heard in open court only by permission of the Judge to whom the case is assigned.

(e) Attorneys employed by the United States. An attorney who is employed or retained by the United States or one of its agencies may appear, file papers and practice in this court in cases in which the United States or the agency is a party, irrespective of (a) - (d) above.

(f) Attorneys employed by a state. A State Attorney General or that official's designee, who is a member in good standing of the bar of the highest court in any state or of any United States Court, may appear and represent

the state or any agency thereof, irrespective of (a) - (d) above.

(g) Attorney representing indigents. Not withstanding (a) - (d) above, an attorney who is a member in good standing of the District of Columbia Bar or who is a member in good standing of the bar of any United States Court or of the highest court of any state may appear, file papers and practice in any case handled without a fee on behalf of indigents under Local Rule 4-2 upon filing a certificate that the attorney is providing representation without compensation.

(h) Attorneys subject to discipline. An attorney who appears pursuant to Paragraphs (b), (e), (f) or (g) of this rule is subject to the disciplinary rules of this court.

(i) Entry or withdrawal of appearance. Attorneys may enter and withdraw appearances in civil actions as provided in Rule 201 of these rules, and in criminal actions as provided in Rule 301 of these rules."

October 6, 1987 amendment to District Court Rule 104.

"RULE 104" "PRACTICE BY ATTORNEYS"

"(a) Practice by members of the Bar of this Court. An attorney who is a member in good standing of the bar of this court may appear, file papers and practice in this Court.

(j) Striking appearances for nonattendance at court proceedings. The Court may, upon notice and after affording an opportunity to be heard, strike the appearance of any attorney in a particular case for failure,

without adequate cause, to attend any hearing, conference or other proceeding. The fact that an attorney's residence or office is located at a place distant from the District of Columbia does not constitute grounds for rescheduling or failing to attend court proceedings".

CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED

Jay Louis Gibson (hereinafter sometimes called client) was returning to Pittsburgh, Pennsylvania from Florida. He was arrested by a joint Amtrak-District of Columbia narcotic squad at Union Station where he was making a transfer from the Florida to the Pittsburgh train and subsequently charged with a narcotic offense, bound over for trial and indicted in the United States District Court for the District of Columbia on July 16, 1987.

On July 27, 1987, United States District Judge Stanley S. Harris granted Allen N. Brunwasser's (hereinafter sometimes called attorney) request to appear pro hac vice and on September 15, 1987 waived his Court's Local Rule 104 so that this attorney could be sole defense counsel.[1]

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[1] Brunwasser is admitted to the Court of Common Pleas of Allegheny County, Pennsylvania to the Superior and Commonwealth Courts of Pennsylvania, to the Supreme Court of Pennsylvania, to the United States Tax Court, the United States District Court for the Western District of Pennsylvania, the United States Court of Appeals for the Third Circuit, the United States Supreme Court and was admitted to practice in February, 1950, after his graduation from Harvard Law School in 1948.

(Continued on following page)

On September 22, 1987, Judge Harris required local counsel which client then retained over his protest he did not need this additional expense.

On November 24, 1987, sua sponte and without previous notice of his intent or any type of opportunity to make argument in resistance or a hearing, Judge Harris removed Brunwasser. This distinguished and learned judicial officer said, inter alia,

"The Court accordingly withdraws its permission for Mr. Brunwasser to participate *pro hac vice* any further in this case, see Local Rule 104 (d). The Nation's capital is scarcely a frontier town with a shortage of qualified lawyers. Defendant may proceed *pro se* (which the Court discourages), or he may proceed with representation by Mr. Jacobovitz or other counsel of his choice. In any event, he must proceed henceforth without Mr. Brunwasser's representation in this court" and

"the withdrawal of permission for Mr. Brunwasser to appear *pro hac vice* is an interlocutory ruling which is not now appealable; *Flanagan v. United States*, 465 US 259

(Continued from previous page)

He has been in active trial and non-trial practice since 1950, has practiced all over the Commonwealth of Pennsylvania, in the first, second, third, fourth, fifth (now the eleventh), sixth and seventh United States Courts of Appeals and in thirteen different states without retaining local counsel.

He has also practiced in the District Court for the Eastern District of Pennsylvania, the Eastern District of Virginia, the District of West Virginia, the Flint and Detroit, Michigan United States District Courts, the United States District Court in Brooklyn, NY and probably other places he has forgotten.

(1984); see also *Richardson-Merrill, Inc. v. Koller,* 105 S. Ct. 2757 (1985)".

Mr. Jacobovitz had previously, without advance warning to client or his attorney of his intent, asked Judge Harris in open court to allow his withdrawal because he was not given sufficient work and to allow client and his Pittsburgh lawyer to continue alone.

He said "I am local counsel in this matter. What I would like to make a motion to do at this point is to withdraw.

The reason I'm doing that is because Mr. Gibson is satisfied with Mr. Brunwasser. They do not want local counsel here.

I do not have any authority to do anything; so Mr. Gibson has not had the benefit of any local counsel's experience on the Rules and experience in court".

Client's limited opportunity to investigate disclosed Mr. Jacobovitz, a young lawyer, has a practice almost entirely supported by criminal justice act appointments.

This request was taken under advisement and later denied "without prejudice" on December 23, 1987 at which time Judge Harris also refused a November 30, 1987 motion to reconsider his November 24, 1987 removal order which he said was effective in both the C.R. #87-311 and[2] the habeas corpus at C.A. #87-1821. Judge Harris said, inter alia,

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[2] Client defended in the District Court by a C.A. #87-1821, July 8, 1987 pre-indictment habeas corpus after the magistrate

(Continued on following page)

"the court sees no need to deal with the many murky matters raised by Mr. Brunwasser in the motion for reconsideration" and noted "on the assumption this issue will be litigated on appeal" and

"Mr. Brunwasser will not be heard again in open court in this case" and

"– it was concluded that it was necessary to withdraw permission for Mr. Brunwasser to appear on behalf of the defendant *pro hac vice*[3]."

On January 5, 1988, Attorney Jacobovitz was allowed to withdraw leaving client without any counsel at all.

Client, on January 8, 1988, wrote letters in re a fee to be paid by him representation to 119 of the 126 lawyers on the Court's Criminal Justice Act list plus 27 of the largest law firms in the District of Columbia; Reed, Smith, Shaw and McClay and Harvard Professor Philip

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(Continued from previous page)

held him for court *and* by resisting the subsequent July 16, 1987 indictment at Cr. #87-311. These cases were consolidated September 15, 1987 on government's motion. When Judge Harris, sua sponte, on November 16, 1987, dismissed the habeas corpus, and refused reconsideration on December 23, 1987. *Both* client and lawyer timely appealed to #88-5023 in the District of Columbia Circuit Court on December 30, 1987. (this appeal also protested attorney's removal at both C.A. #87-1821 and Cr. #87-311 and is reproduced in this petition at 1-A to 3-A).

[3] Petitioners' have not gone into all the details of the removal because this would raise problems not relevant to this petition and also be impossible to present within the thirty page limit allowed for this petition by Rule 21.4.

Heymann and Alan Dershowitz but was unable to obtain a satisfactory representation.

Judge Harris, after a February 4, 1988 conclusion this was all a facade, advised that day that he intended to have a magistrate appoint a lawyer to be compensated at client's expense, regardless of any protest, and set an agenda detailing what client and his appointed lawyer were to there do and prohibited pro se client pleadings unless signed by this lawyer.[4]

On January 5, 1988, *both* client and attorney filed a "Petition for writ of mandamus, prohibition, exercise of supervisory authority and extraordinary 28 USC 1651 relief in re actions of United States District Judge Stanley S. Harris taken from September 30, 1987 at C.A. #87-1821 and Cr. #87-311 and, in particular, on December 23, 1987".

This proceeding, docketed in the United States Court of Appeals for the District of Columbia Circuit at #88-5002, challenged, inter alia, lawyer's removal plus Judge Harris' refusal of their request he advise them exactly what they can and cannot do in the pending cases in re the attorney-client function.

On January 11, 1988, client and attorney Express Mailed an amended petition bringing the Court of Appeals up to date on new events which included a

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[4] This appears contrary to 26 USC 1654 which directs "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein".

January 5, 1988 posting of two United States Marshalls right in front of lawyer (at that time restricted to the court audience behind the separation barrier) who was then prevented by them in a hostile manner from an attempt to signal client and Jacobovitz that he wanted to talk to them, Judge Harris' conclusion client's attempt to obtain a lawyer from the 27 large firms was futile especially since they were not trained in this area[5] and the removal of Attorney Jacobovitz.

On February 4, 1988, Judge Harris filed an order directing a United States Magistrate select a F.R.Cr.P. 44 (a) lawyer for client.

On January 18, 1988, client and lawyer Express Mailed a second amended petition detailing the so far unsuccessful efforts to obtain local counsel and requesting removed counsel be reinstated.

On February 20, 1988, client and lawyer Federal Expressed a fourth amended petition which advised the Court of Appeals that client's expensive preparation for an appearance at a Judge Harris scheduled February 16, 1988 suppression hearing together with former large law firm Attorney, Patricia Douglass, and his removed lawyer was wasted because without previous to hearing notice, Judge Harris had continued the hearing by order dated February 5, 1988 but not filed until February 10, 1988 with his own docket clerk who gave him no previous to hearing notice and obviously advised eight subpoenaed

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[5] As will be later discussed, this proved to be untrue as client did obtain a very competent lawyer who was associated with one of these large law firms.

witnesses plus the United States Attorney not to appear and Magistrate Attridge appointed a lawyer to represent him on February 5, 1988 but did not notify client or his Pittsburgh attorney.

On January 17, 1989, at #88-5002, the Court of Appeals granted allowance to amend as the above petitions had requested. (16-A).

On February 12, 1988, at #88-5023, a Panel of the Court of Appeals issued a rule directing "Appellant show cause within twenty-one days of the date of this order why the order of the District Court dismissing this case should not be affirmed on the ground that the habeas corpus petition constitutes an impermissible preemptive attack on pending criminal charges; *Deaver v. Seymour,* 822 F.2d 66 (D.C. Cir. 1988). (35-A).

Client answered by saying the constitutional remedy of habeas corpus can (and here was used to) grant relief far beyond that provided by Deaver's request for injunctive and declaratory relief, was filed before indictment (contrary to Deaver who proceeded after indictment, that Deaver was not the basis of the District Court's dismissal, raised questions about District Court remedies if the habeas corpus proceeding was removed and whether the District Court's order had retroactive effect and cited *Hilton v. Braunskill,* 1987, ___ US ___, 107 S. Ct. 2113, 2118 and *Coleman v. Burnette,* 1973, C.A.D.C., 477 F.2d 118.

On February 9, 1988, at #88-5002, a Panel of the Court of Appeals directed "that Respondents answer the petition on the limited issue of the propriety of the order of the District Court withdrawing permission for Attorney Brunwasser to appear *pro hac vice* without providing

notice and opportunity to be heard, and the resulting potential impact on Gibson's sixth amendment right to counsel" and "– the petition for writ of mandamus be denied in all other respects". (15-A).

The United States Attorney plus four Assistants filed a response to which client and attorney filed a motion to strike because, inter alia, the said answer went beyond the February 9, 1988 order, but this motion was denied on January 17, 1989.

On February 5, 1988, client Express Mailed a petition asking the District Court to investigate the impact of large volume criminal justice appointments on his ability to obtain a District of Columbia lawyer at a reasonable fee and a motion in re the February 16, 1988 suppression hearing plus a request attorney be allowed "to function as an investigator at the February 16, 1988 hearing, sit at the counsel table and be allowed to confer during that or any subsequent hearing or proceeding" but the clerk returned both these motions on February 10, 1988, the same date they were received.

On January 17, 1989, the Court of Appeals Panel entered two orders at #88-5002. The first (16-A) was procedural and the second (18-A) denied mandamus because its required factors had not been shown.

On January 17, 1989, the Court of Appeals Panel discharged its February 12, 1988 rule (36-A), affirmed the District Court's November 24, 1987 and December 23, 1987 orders because they were interlocutory and habeas corpus before conviction was not called for in this particular case.

On January 30, 1989, client and lawyer filed a petition for rehearing and suggestion of rehearing en banc at both #88-5002 (4-A to 14-A) and #88-5023 (19-A to 34-A).

On March 15, 1989, both petitions were denied (38-A to 40-A).

The United States Attorney founded jurisdiction of the District Court on the sixth amendment because client was arrested and committed the alleged crime at Union Station in the District of Columbia.

REASONS FOR ALLOWANCE OF THE WRIT

SUMMARY OF ARGUMENT

Brunwasser had already been admitted under Local Rule 104.

Judge Harris subsequently removed Brunwasser sua sponte and ended his ability to function as a lawyer in the District of Columbia. This restriction also covered preparation of papers outside the District since Gibson was not permitted to file pro se pleadings unless his Magistrate Attridge February 5, 1988 forced upon him lawyer also signed.

The removal was ordered without advance warning of Judge Harris' intent and without any previous to decision argument. No pre or post decision hearing of nay type so an evidentiary record could be made was provided.

Petitioners respectfully suggest the action taken here strikes at basic and fundamental fifth amendment due process and sixth amendment right to counsel of choice and is a prohibited trade restriction to favor local counsel and generate fees for them at the expense of out of District unfortunates who do not know where to begin in choosing a skilled and loyal only to them representative.

In addition, the District Court's power to remove a specifically admitted lawyer at whim will obviously chill his assertion of a vigorous defense when he knows displeasing the Judge can result in his sua sponte removal.

ARGUMENT

On the issue of Local Rule 104 application, Petitioners rely upon *Barnard v. Thornstein*, March 6, 1989, #87-1939, #49 CCH S. Ct. Bull, Page 1496 and *Frazier v. Heebe*, 1987, ___ US ___, 107 S. Ct. 2607.

Local Rule 104 allows all types of exceptions where no fee is involved because the client is an indigent or a federal or state party or agency represented by its regularly employed or hired for that case alone counsel. Why should a non-government client who is not an indigent be given special and expensive treatment including the extra step of having local counsel sign all proceedings before they can be filed?

If the issue is one of needed local control, Petitioners suggest a federal or state civil service protected lawyer is no less in need of this supervision than an on his or her own private practitioner. In fact, a government

entrenched lawyer, backed by state or federal resources, would be more difficult to control.

The decision of the Court of Appeals has restricted the cherished civil right of habeas corpus which has no remedy limit and is basic to monitor the conduct of lower courts even if it is never used and keep them on the right track.

The recent case of *Teague v. Lane*, February 22, 1989, 49 CCH S. Ct. Bull. 1175, 109 S. Ct. 1060 cogently advised "the threat of habeas corpus serves as a necessary incentive for trial and appellate Judges throughout the land to conduct their procedures in a manner consistent with established constitutional principles" (Page 1194, four Justices) and provides Supreme Court oversight for "every possible case of privation of liberty contrary to the national constitution – or laws" (Page 1196, two Justices).

Petitioners respectfully suggest the learned and distinguished Panel of the Court of Appeals has misread *Sunal v. Large*, 1947, 322 US 174, 179 and N.11 on which its January 17, 1989 (37-A) order relies and further that *Sunal* is actually authority for them.

Sunal does not confine habeas corpus to "rare and unusual circumstances" as that Panel's January 17, 1989 order concludes. The *Sunal* Petitioners lost because he did not appeal his draft case when he could have and, after time limit had run, tries to use habeas corpus as an alternative to appeal.

Even then the opinion advised that if defendant had appealed and lost, there might be a different decision (332 US at 181). The Supreme Court was concerned that

allowance of this procedure would mean a case was never over and observed that only a procedural – not a constitutional right, which might be sufficient for habeas corpus was involved (id. at 182).

The Supreme Court concluded (id. at 184) "When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to habeas corpus to put an end to the restraint".

Petitioners were given no hearing by Judge Harris and respectfully argue that *Sunal* is authority for rather than against them.

Fay v. Noia, 1963, 83 S. Ct. 822, 841, N.35, 372 US 391, 394, N.35 limits *Sunal* to "federal prisoners who did not appeal their convictions" especially when the issues are "not even of constitutional dimensions".

Fay also instructed that "the Writ of Habeas Corpus is a new suit" (id. 841/423, N.34) and "the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. It is not a proceeding in the original action" (id., N.34).

Petitioners thus argue this *new* proceeding should not be considered a part of the underlying criminal case and should have been decided on the merits by the Court of Appeals and should so be decided here. See also *Davis v. U.S.*, 1974, 417 US 333, 345-346, 94 S. Ct. 2298, 2304-2305; *Kaufman v. U.S.*, 1969, 89 S. Ct. 1068, 1072, 349 US 217, 223 which confines *Sunal* to not taking an appeal and the facts of that case and expanding habeas corpus to a

plenary remedy and *Hilton v. Braunskill*, 1987, 107 S. Ct. 2113, 2118 and N.5, ___ US ___, advising civil habeas corpus allows fashioning an appropriate remedy.

In sum, Gibson has been deprived of a lawyer of his choice and required to proceed with a court selected District of Columbia lawyer whose interests and strategy may differ from Gibson's.

If the District Court is determined to get rid of Brunwasser, it may fall within the reasoning of *Strum v. Clark*, 1987, C.A.3, 835 F.2d 1009, 1015. If it just doesn't want to deal with out of town counsel, it may have brought its antagonism within the teaching of *Johnson v. Mississippi*, 1971, 403 US 212, 216, 91 S. Ct. 1778, 1780 (prejudice against civil rights lawyers).

Petitioners respectfully suggest that removal of a selected lawyer and substitution of a court selected lawyer against Gibson's wishes and a bar against Gibson's filing his own pleadings and/or legal talking to Brunwasser in the District also provide the rare and unusual circumstances required by the Court of Appeals' January 17, 1989 order; see *Perry v. Leeke*, January 10, 1989, ___ US ___, 109 S. Ct. 594, 600 (no right to confer with counsel during cross-examination, but general bar unconstitutional).

On December 23, 1988, en banc, twelve Judges, the District of Columbia Court of Appeals expanded habeas corpus to strike down a criminal change of venue without prior entry of a rule to show cause so defendant there could resist before the transfer order was entered; *Chatman-Bey v. Thornburgh*, 864 F.2d 804.

Petitioners respectfully suggest removal of counsel and what has been detailed above comes within *Chatman* and should enjoy at least similar procedures; see also *Koller v. Richardson-Merrill, Inc.*, 1984, C.A.D.C., 737 F.2d 1038, 1054 (once omitted, out of town lawyer can't be removed without previous hearing citing Third Circuit cases); vacated, 105 S. Ct. 2757, 472 US 424 but with removal hearing issue untouched; *Carey v. Piphus*, 1978, 98 S. Ct. 1042, 435 US 247; *In Re American Cable Publications, Inc.*, 1985, C.A.10, 768 F.2d 1194, 1195 (client obtains mandamus when his attorney is removed; appeal treated as mandamus).

Petitioners also respectfully urge the United States Supreme Court to grant certiorari because the counsel procedure here is an "issue of first impression"; *Schlagenhauf v. Holder*, 1964, 379 US 104, 110, 85 S. Ct. 234; *In Re United States*, 1979, D.C.C.A., 598 F.2d 233, 237 or founded upon improper reasons; *Thermtron Products, Inc. v. Hermansdorfer, Judge*, 1976, 423 US 336, 342-353, 98 S. Ct. 584, 589-594 or an unequal application of the law; *Teague v. Lane*, supra, 49 CCH S. Ct. Bull. at Page 1184, 1192, 1207.

Also, if mandamus can be used to vacate a stay which deprives a party of a requested Jury Trial; *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 1988, ___ US ___, 108 S. Ct. 1133, 1143, N.3, Petitioners suggest it is also available when chosen counsel is removed.

Petitioners also respectfully suggest the #88-5002 decision has overruled, sub silento, the numerous Court of Appeals cases cited in their reargument petition (19-A to 34-A).

In sum, the Court of Appeals discharged its February 9, 1988 rule (36-A) without answering it when the issue was one of pure law, had been briefed and was ripe for decision; *International Brotherhood of Electrical Workers v. I.C.C.*, November 25, 1988, C.A.D.C., 862 F.2d 330, 334-335 (issue "purely a legal one", appeal allowed especially if issue will be presented in future cases and hardship involved).

If Brunwasser attempts to practice in any future case in the District Court, all other Judges, including Judge Harris, will be required to respect his removal and not allow him to practice so the decision has impact far beyond this single case.

The #88-5023 Panel's January 17, 1989 order relied on three cases in holding Petitioners' appeal barred by the interlocutory rule (36-A).

Petitioners respectfully suggest that *Flanagan v. U.S.*, 1984, 465 US 259, 269 does not control because, there, only the client appealed whereas here, both Gibson and Brunwasser have appealed (1-A); see *Law Offices of Chase v. F.C.C.*, 1988, C.A.D.C., 843 F.2d 517, 521 (both attorney and client must appeal); *Richardson-Merrill, Inc. v. Koller*, 1985, 105 S. Ct. 2787, N.3, 472 US 479, N.3 (attorney can appeal his removal; client may be able to bring mandamus or take interlocutory appeal).

Petitioners respectfully fail to understand and how *Penson v. Ohio*, November 28, 1988, 57 U.S.L.W. 4020, 4023, 109 S. Ct. 346, 352 (counsel files Anders Brief and is allowed to withdraw; failure to replace him during appeal held error) applies to the issues in this case. In

fact, its holding that lack of counsel is presumed prejudicial and non-harmless appears to support them.

Deaver v. Seymour, 1987, D.C.C.A., 822 F.2d 66, 70-1, involved that Defendant's attempt to remove the prosecutor's counsel whereas, here, defendants own selected counsel has been removed.

Also, there, no habeas corpus was involved as here and *Deaver* proceeded by rule of procedure declaratory judgment, and injunction whereas, here, a constitutional Article 1, Section 9, Clause 2 constitutional guarantee is involved.

The *Deaver* Court also qualified its decision by a requirement of good faith and lack of chill factors not present there but which may be present here.

In Re Sealed Case, D.C.C.A., 1987, 829 F.2d 50, 53 qualified *Deaver* by advising the appointment of special counsel could be raised if Colonel North was indicted, but even there, Judge Williams would allow an appeal before indictment (829 F.2d at 63).

Petitioners respectfully suggest attempting to remove a prosecutor when he can be replaced by other already employed and expert United States Attorneys is not the same thing as removal of sixth amendment chosen counsel and replacing him by a qualifications unknown to Gibson attorney court appointed representative.

What if this lawyer omits to do something Brunwasser would do or recommend or does not follow procedures to preserve Gibson's defenses and these defenses are then held to have been waived; *DeShaney v. Winnebago*

County D.D.S., February 22, 1989, ___ US ___, 109 S. Ct. 998, 1003, N.2.

Also, Brunwasser is barred from any post-conviction proceedings and any requests for post-conviction relief in the event appointed counsel functions ineffectively.

CONCLUSION

The recent case of *Fuller v. Diesslin*, February 24, 1989, C.A. 3, 868 F.2d 604 is almost a twin of this case except that out of town counsel was not admitted.

In granting habeas corpus directed to the State Court, the Court of Appeals observed that lawyers are not fungible, that the type of defense received and advice given depends on the selected lawyer, availability of local counsel is irrelevant, that hearing plus findings are required, discussed the issues and factors to be considered, concluded there is no presumption out of state counsel will cause schedule problems or delay and observed the First Circuit Court of Appeals is in agreement (868 F.2d at 608) but the Eighth Circuit Court of Appeals disagrees and created a presumption local counsel will provide a more orderly case (868 F.2d at 612).

We thus already have a circuit disagreement on this issue which is another good reason why certiorari should be granted.

On balance, Petitioners respectfully urge the United States Supreme Court to rule that whatever purpose was to be served by removal of his chosen counsel without due process and substitution of a lawyer he does not

want, but must pay, is far outweighed by the actual and potential damage he and Brunwasser will face so that an appeal should be allowed and/or relief provided by mandamus or/and habeas corpus and certiorari allowed so that the decisions of the Court of Appeals can be vacated with directions to decide the issues on the merits.

Respectfully Submitted,

JAY LOUIS GIBSON
Petitioner

1013 Alquin Street
McKeesport, PA
412-391-0329

ALLEN N. BRUNWASSER
Petitioner

P.O. Box 22212
Pittsburgh, PA 15222
412-391-0329

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,

vs. CR. #87-0311 (SSH)

JAY LOUIS GIBSON,
Defendant

xxxxx

UNITED STATES OF AMERICA
EX REL JAY LOUIS GIBSON, C.A. 87-1821
1013 ALQUIN STREET,
McKEESPORT, PA
(412) 391-0329,
Plaintiff,

vs.

DARREN WOLPERT, D.E.A.,
EAST BUILDING, NEAR THE NATIONAL
AIRPORT, WASHINGTON, D.C.,
Defendant

NOTICE OF APPEAL
(Filed Dec. 30, 1987)

1. The above cases were consolidated on Motion of the United States Attorney by Judge Stanley S. Harris on September 15, 1987.

2. On December 23, 1987, Judge Stanley S. Harris entered Orders at both C.A. #87-1821 which he dismissed and at Cr. #87-0311 in which he, inter alia, removed Allen N. Brunwasser, Esquire, from the case and, in effect, suspended him from functioning as a lawyer in Court Room 14.

3. Allen N. Brunwasser, Esquire, and Jay Louis Gibson appeal from both the said Orders entered by district Judge Stanley S. Harris at both C.A. #87-1821 and Cr. #87-0311 on December 23, 1987 in the United States District Court for the District of Columbia.

4. Although, at first blush, Jay Louis Gibson's appeal in re removal of his counsel might appear interlocutory, he takes the position that this action of Judge Harris has, on the facts and circumstances of this case, deprived him of his sixth amendment right to counsel who will defend him according to sixth amendment standards and also to fifth amendment due process so that he has the absolute right not to be proceeded against at all and has an immediate right of appeal similar to that in double jeopardy and qualified and absolute immunity cases.

A. For example, the lawyer Judge Harris appears to want Jay Louis Gibson to retain has received 112 C.J.A. appointments for 1986 and 1987 and been paid already $73,753.64 on this work and Jay Louis Gibson will have an almost impossible task of obtaining new counsel in the District over the Christmas-New Year holidays.

B. *Evitts v. Lucey,* 1985, 469 US 387, 394, 105 S. Ct. 830, 835 ("as we have made clear, the guarantees of counsel "cannot be satisfied by mere formal appointment").

C. *Polk County v. Dodson,* 1981, 454 US 312, 323, 102 S. Ct. 445, 452 (professional codes, not government which pays salary, defines obligation of public defender to client).

D. *In Re Sealed Case*, August 20, 1987, D.C.C.A., 829 F.2d 50 ("here and now" conduct to please those superiors who can hurt you discussed).

5. Jay Louis Gibson and Allen N. Brunwasser also take the position that Jude Harris' Orders are in the nature of declaratory judgments which are appealable as final orders; *Thermice Corp. v. Vistron Corp.*, October 29, 1987, C.A.3, 832 F.2d 248, 251.

6. In addition, the Appeal Court can consider the issue if it so desires as was done in *Frazier v. Heebe*, June 19, 1987, 107 S. Ct. 2607; see also *Richardson-Merrill, Inc. v. Koiler*, 1985, 105 S. Ct. 2787, N.3 472 US 479, N.3 (attorney can appeal his removal; client might be able to bring mandamus or take interlocutory appeal).

7. The appeal is to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully Submitted,

/s/ Allen N. Brunwasser
Allen N. Brunwasser
P.O. Box 22212
Pittsburgh, PA 15222

412-391-0329

/s/ Jay Louis Gibson
Jay Louis Gibson
1013 Alquin Street
McKeesport, PA

412-664-4194

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 88-5002 SEPTEMBER TERM 1988
Cr. No. 87-0311
C.A. No. 87-1821

IN RE JAY LOUIS GIBSON and
ALLEN N. BRUNWASSER,

petitioners

PETITION FOR REHEARING AND SUGGESTIONS OF REHEARING EN BANC FILED IN RE JANUARY 17, 1989 ORDER OF A PANEL COMPOSED OF ROBINSON, SILBERMAN AND WILLIAMS, CIRCUIT JUDGES, WHO DENIED PETITION FOR WRIT OF MANDAMUS FOR RELIEF OF ACTIONS OF UNITED STATES DISTRICT JUDGE STANLEY S. HARRIS TAKEN FROM SEPTEMBER 30, 1987 AT C.A. #87-1821 AND Cr. #87-0311 AND, IN PARTICULAR, ON DECEMBER 23, 1987

(Received January 30, 1989)

FILED ON BEHALF OF
PETITIONERS

JAY LOUIS GIBSON
1013 ALQUIN STREET
McKEESPORT, PA
412-391-0329

ALLEN N. BRUNWASSER
P. O. BOX 22212
PITTSBURGH, PA
412-391-0329

CERTIFICATION OF SERVICE

On the 31st day of January, 1989, copy hand delivered to Judge Stanley J. Harris and United States Attorney.

/s/ Allen N. Brunwasser
Allen N. Brunwasser

TO THE HONORABLE, THE CHIEF JUDGE AND THE ASSOCIATE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Jay Louis Gibson and Allen N. Brunwasser respectfully represent:

1. That on January 5, 1989, they filed a joint petition for writ of mandamus, prohibition, exercise of supervisory authority and extraordinary 28 USC 1651 relief together with two volumes of an appendix with the Clerk of this Honorable Court of Appeals.

2. That Jay Louis Gibson is a Defendant in a criminal case pending in the United States District Court for the District of Columbia before District Judge Stanley J. Harris and Allen N. Brunwasser is his attorney.

3. That the basic problem presented is the continued determination of Judge Harris to eliminate Allen N. Brunwasser as Counsel because both he and Jay Louis Gibson reside in the Pittsburgh, Pennsylvania area and Brunwasser is not admitted to practice in the District of Columbia.

4. That on December 30, 1987, *both* Jay Louis Gibson and Allen N. Brunwasser filed a notice of appeal from the removal of Allen N. Brunwasser as counsel, without

advance notice or a hearing, all of which deprived Jay Louis Gibson from selecting counsel of his choice (see January 5, 1988 hearing, T12-13, Appendix #3) at C.A. #87-1821 and Cr. #87-0311. This matter received #88-5002 (see Appendix #1, OA35-37).

5. That both proceedings were assigned to Circuit Judges Robinson, Silberman and Williams who, on February 12, 1988, entered a rule on Jay Louis Gibson to show cause why his appeal at #88-5023 should not be dismissed and February 9, 1988 ordered Judge Harris and the United States Attorney respond "on the limited issue of the propriety of the order of the District court withdrawing permission for Attorney Brunwasser to appear *pro hac vice* without providing notice and opportunity to be heard and the resulting potential impact on Gibson's sixth amendment right to counsel" and denied the remainder of the mandamus petition.

6. That Jay Louis Gibson filed a timely answer to this rule (see Appendix #6, 57-a to 83-a).

7. That everything filed by Jay Louis Gibson and Allen N. Brunwasser is again presented for this Court's convenience in an appendix filed with this present petition.

8. That on January 17, 1989, the Panel denied the petition for mandamus, discharged the appeal order to show cause and affirmed the November 24, 1987 and December 23, 1987 habeas corpus orders of Judge Harris.

9. That the February 9, 1988 rule and the January 17, 1989 orders are attached to this present petition.

A. Judge Harris did not answer, but the Assistant United States Attorney did (see Appendix #6, 1-a to 54-a).

B. Mandamus Petitioners then filed a February 19, 1988 motion to strike (see Mandamus pleadings, Appendix #5, 1-a to 68-a).

CONCISE STATEMENT OF ISSUE AND ITS IMPORTANCE

A. Petitioners respectfully suggest the January 17, 1988 Panel decision conflicts with *Koller v. Richardson-Merrill, Inc.*, 1984, C.A.D.C., 737 F.2d 1038, 1054.

B. Petitioners believe and urge the Court to rule that the issue of removing Gibson's chosen Counsel sua sponte and without a hearing is of sufficient exceptional importance to allow en banc review especially when the impact of exclusion Local Rule 104 is presently in adjudication doubt and failure to resolve it now can generate numerous problems when out of District of Columbia Counsel are prevented from representing their clients in the District of Columbia.

C. The United States Supreme Court granted certiorari in *Virgin Island Bar Assn. v. Thorstein* at #87-2008 on June 30, 1988 and Petitioners believe that decision may control this case and thus respectfully urge this Honorable Court to reinstate this case plus await the learning which may be presented by the United States Supreme Court.

D. In addition, Petitioners respectfully suggest that it would be a waste of judicial resources to dismiss this case and then, if the *Virgin Island* case disclosed an

error was made, have the residency issue presented again.

LAW OVERLOOKED OR MISAPPREHENDED AND ARGUMENT

10. The Sixth Amendment gives Jay Louis Gibson a clear right to counsel of his choice; *Pennsylvania v. Finley*, 1987, ___US___, 107 S. Ct. 1990, 1993; *U.S.A. v. Lee*, 1956, D.C.C.A., 235 F.2d 219, 221 and the clear right to consult with counsel of his choice; *Mudd v. U.S.A.*, 1986, C.A.D.C., 798 F.2d 1509, 1510-1514; *Martin v. Lauer*, 1982, C.A.D.C., (Stanley S. Harris, United States Attorney), 686 F.2d 24, 32-36 and N.36.

11. Judge Harris destroyed that clear right when he removed Allen N. Brunwasser from all participation in his case.

A. At the January 5, 1988 proceeding (see Appendix #3, T12-13) Judge Harris advised Jay Louis Gibson "Certainly you are free to talk with Mr. Brunwasser in Pennsylvania or anywhere else. Mr. Brunwasser may not represent you in this case."

B. At the same January 5, 1988 proceeding, Judge Harris authorized and/or approved the actions of two United States Marshalls who prevented in the audience Brunwasser from even visual contact with Jay Louis Gibson or Attorney Jeffrey Jacobovitz, both of whom were at counsel table (see Motion to Amend, Appendix #5, Pages 2 to 3, 23-a to 24-a).

C. Judge Harris has refused to advise Jay Louis Gibson or Allen N. Brunwasser exactly what his

Brunwasser removal order covers (see original Petition for Mandamus, Appendix #5, Page 4, 5-a) and thus places them at risk if either does what Judge Harris, after the fact, says was forbidden.

12. Both Jay Louis Gibson and Allen N. Brunwasser have a clear Fifth Amendment right not to suffer economic discrimination which excludes Gibson's Counsel from participation at this trial and/or favors local practitioners; *Frazier v. Heebe*, 1987, ___US___, 107 S. Ct. 2607; *Esposito v. Barnard*, 1987, C.A.3, 829 F.2d 1436.

13. Jay Louis Gibson and Allen N. Brunwasser respectfully suggest a fair evaluation of the record here clearly discloses Judge Harris took away that right.

14. Both Jay Louis Gibson and Allen N. Brunwasser have a clear right that Brunwasser, once admitted, not be removed without a previous to removal hearing.

A. *Koller v. Richardson-Merrill, Inc.*, 1984, C.A.D.C., 737 F.2d 1038, 1054 (vacated 105 S. Ct. 2757, 472 US 424 but with Court of Appeals removal decision untouched) directs that, once admitted, an out of town lawyer can't be removed without a previous hearing and cites with approval *Cooper v. Hutchinson*, 1950, C.A.3, 184 F.2d 119, 123 and *Johnson v. Trueblood*, 1980, C.A.3, 629 F.2d 302. See also *Carey v. Piphus*, 1978, 98 S. Ct. 1042, 435 US 247.

B. Local Rule 104 was amended on October 6, 1987 to provide for a pre-removal hearing if counsel is removed "for nonattendance" and foreclosing said removal to "without adequate cause".

(1) Local Rules are to be obeyed unless there are "uncontrollable circumstances"; *Kass v. Baskin*, 1947, C.A.D.C., 164 F.2d 513, 516.

(2) A rule of court has the force of law; *Weil v. Neary*, 1928, 278 US 160, 169, 49 S. Ct. 144, ___, citing two District of Columbia Court of Appeals cases.

(3) The best way to interpret a rule is to read what it says; *Nichols v. Board of Trustees of the Asbestos Workers Local 24 Pension Plans*, 1987, C.A.D.C., 835 F.2d 881, 892, N.86.

15. Jay Louis Gibson and Allen N. Brunwasser respectfully suggest that a fair evaluation of this record clearly discloses Judge Harris has taken away this clear right.

16. The Panel's January 17, 1989 order took judicial notice of #88-5023 where Jay Louis Gibson's and Allen N. Brunwasser's appeals were dismissed (Jay Louis Gibson and Allen N. Brunwasser are filing a motion for rehearing and suggestion for rehearing en banc on this January 17, 1989 order and respectfully request it be examined as part of deciding this petition).

17. Jay Louis Gibson and Allen N. Brunwasser thus respectfully suggest they have no other adequate remedy.

18. Petitioners also respectfully suggest the duty of Judge Harris to have a pre-removal hearing was not discretionary but was absolute.

A. The Court is respectfully requested to apply the cases cited above and

B. Also consider

(1) *Ramirez v. Rivera-Dueno,* November 17, 1988, C.A.1, 861 F.2d 328, 334-5 (District Court denies trial and orders parties to mediate liability, collateral review on appeal not available, mandamus proper).

(2) *Schlagenhauf v. Holder,* 1964, 379 US 104, 110, 85 S. Ct. 234 (mandamus proper to determine "issue of first impression in re interpretation of F.R.C.P. 35).

(3) *In Re United States,* 1979, D.C.C.A., 598 F.2d 233, 237 (affirming *Schlagenhauf* on the "issue of first impression" and, in refusing relief, advising relief proper when court acts sua sponte without motion and declining to advise if "supervisory" and "advisory" mandamus are still available).

(4) *Colonial Times, Inc. v. Gasch, U.S.D.J.,* 1975, D.C.C.A., 509 F.2d 517, 525, 526, N.25 (*Schlagenhauf* affirmed on "issue of first impression", writ granted when District Court refused to allow depositions be taken without stenographer; "supervisory mandamus" instruct to District Courts on undecided issues in order to eliminate presently non-appealable uncertainty and set standards discussed; mandamus like injunctive relief and proper when lower court applies wrong factors or neglects to apply correct ones).

(5) *National Right to Work Legal Defense and Education Foundation, Inc. v. Richey, U.S.D.J.,* 1975, 510 F.2d 1239, 1243 (mandamus refused in disclosure order but indication deliberate violation of rules sufficient to grant it or to clarify a legal question that might aid lower court Judges who are in conflict or doubt; *Schlagenhauf* and *Gasch,* supra, approved.

(6) *Five v. McGuire*, 1970, C.A.D.C., 433 F.2d 499, 501 (mandamus used to vacate sua sponte venue transfer order).

(7) *Appeal of Ligett Group, Inc.*, 1986, C.A.3, 785 F.2d 1109, 1117 (unappealable order clearly erroneous because of application of wrong standards sufficient for mandamus).

(8) *American Catacean Society v. Baldridge*, 1985, C.A.D.C., 768 F.2d 1425 (ministerial duty to act can be enforced by mandamus which is also good to decide interpretation doubt).

(9) *In Re American Cable Publications, Inc.*, 1985, C.A.10, 768 F.2d 1194, 1195 (client obtains mandamus when his attorney is removed; client's appeal treated as mandamus).

(10) *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, March 22, 1988, ___US___, 108 S. Ct. 1133, 1143, N.3 (stay order which deprives party of requested Jury Trial can be reversed on mandamus citing *Beacon Theatres, Inc. v. Westover*, 1959, 359 US 500, 510-511, 79 S. Ct. 948, 957.

(11) *In Re Zweibon*, 1977, D.C.C.A., 565 F.2d 742 (mandamus proper when party deprived of requested jury Trial, *Beacon*, supra, cited with approval).

(12) *Hewlett v. Davis*, April 6, 1988, C.A.3, 844 F.2d 109, 115 (28 USC 1447 (d) prohibitions of appeal or mandamus from removal remand to state court is no bar to mandamus when improper remand reason used by district Court citing *Thermtron Products, Inc. v. Hermansdorfer, Judge*, 1976, 423 US 336, 342-353, 96 S. Ct. 584, 589-594).

(13) *U.S. Industries, Inc. v. Blake Construction Co.*, 1982, C.A.D.C., 671 F.2d 539, 551 approving *Thermtron* and issuing 1982, C.A.D.C., 671 F.2d 539, 551 approving *Thermtron* and issuing mandamus to correct remand for improper reason.

19. Petitioners respectfully urge the Court en Banc to rule that they have clearly brought themselves within the provisions of its only cited case of *Ganem v. Heckler*, 1984, C.A.D.C., 746 F.2d 844, 852 where, incidentally, mandamus was allowed to direct the Secretary of Health to make an available investigation of the law so she could render a decision and to reject her argument she had no means to make this investigation.

20. Petitioners have a clear right to a pre-removal of Brunwasser hearing once he is admitted even if he could have been properly excluded; *Koller v. Richardson-Merrill, Inc.*, 1984, C.A.D.C., 737 F.2d 1038, 1054.

A. The District Court had an absolute duty to grant this pre-removal hearing and did not.

B. There is no other adequate remedy available especially since Petitioners' appeal was dismissed at #88-5023 on January 17, 1989.

C. If denial of the right to a Jury Trial is sufficient grounds for mandamus, Petitioners respectfully suggest denial of an entire trial comes within the protection of that rule.

D. Petitioners have reproduced in six appendix volumes the records to this point and incorporate this material into this petition with the respectful request it be read in deciding this present petition.

WHEREFORE, Jay Louis Gibson and Allen N. Brunwasser respectfully request rehearing and make a suggestion and request for rehearing en banc.

Respectfully Submitted,

Jay Louis Gibson

/s/ Allen N. Brunwasser
Allen N. Brunwasser

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5002 **September Term, 1987**

CA 87-01821
CR 87-00311

In re:

Jay Louis Gibson and
Allen N. Brunwasser,

Petitioners

BEFORE: Robinson, Silberman, and Williams
Circuit Judges

O R D E R
(Filed February 9, 1988)

Upon consideration of the petition for writ of mandamus filed in this action and the record in the court below, it is

ORDERED by the court that respondents answer the petition on the limited issue of the propriety of the order of the district court withdrawing permission for Attorney Brunwasser to appear *pro hac vice* without providing notice and opportunity to be heard, and the resulting potential impact on Gibson's Sixth Amendment right to counsel. Respondents will file answers by February 19, 1988. It is

FURTHER ORDERED that the petition for writ of mandamus be denied in all other respects.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5002 **September Term 1988**

Cr. No. 87-0311
C.A. No. 87-1821

In Re:

Jay Louis Gibson and
Allen N. Brunwasser,

Petitioners

BEFORE: Robinson, Silberman and Williams, Circuit Judges

O R D E R
(Filed January 17, 1989)

Upon consideration of petitioners' Motion to Amend Petition, etc., filed January 12, 1988; Second Motion to amend Petition, etc., filed January 19, 1988; second Second Motion to amend Petition, etc., filed February 16, 1988; Fourth Motion to Amend Petition, etc., filed February 22, 1988; motion to strike the respondent United States' answer to the petition for writ of mandamus; and respondent United States' motion for leave to file corrected copy of its opposition, it is

ORDERED that petitioner' motions to amend and respondent United States' motion for leave to file corrected copy of its opposition be granted. It is

FURTHER ORDERED that petitioners' motion to strike the United States' answer to the petition for writ of mandamus be denied.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5002 **September Term, 1988**

Cr. No. 87-0311
C.A. No. 87-1821

In Re:

Jay Louis Gibson and
Allen N. Brunwasser,
Petitioners

BEFORE: Robinson, Silberman and Williams, Circuit Judges

O R D E R
(Filed January 17, 1989)

Upon consideration of the petition for writ of mandamus filed in this action and the record in the court below, and taking judicial notice of the proceedings in *Gibson v. Wolpert*, No. 88-5023 (D.C. Cir. *docketed* January 25, 1988), it is

ORDERED that the petition for writ of mandamus be denied. Mandamus is an extraordinary remedy that is not available unless the petitioner has a clear right to the relief sought, the respondent has a nondiscretionary duty to honor that right, and no other adequate remedy is available. *See Ganem v. Heckler*, 746 F.2d 844, 852 (D.C. Cir. 1984). None of these factors is present in this case.

Per Curiam

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO.88-5023 SEPTEMBER TERM 1988
C.A. No. 87-01821
Cr. No. 87-0311

UNITED STATES OF AMERICA
EX REL JAY LOUIS GIBSON
1013 ALQUIN STREET
McKEESPORT, PA
(412) 391-0329

Appellants

vs.

DARREN WOLPERT, D.E.A.
EAST BUILDING, NEAR THE
NATIONAL AIRPORT, WASHINGTON, D.C.

PETITION FOR REARGUMENT AND REHEARING AND SUGGESTION REQUEST FOR REHEARING AND REHEARING EN BANC FILED BY APPELLANTS JAY LOUIS GIBSON AND ALLEN N. BRUNWASSER FROM THE JANUARY 17, 1989 PANEL DECISION OF ROBINSON, SILBERMAN AND WILLIAMS, CIRCUIT JUDGES, AFFIRMING HABEAS CORPUS DISMISSAL BY UNITED STATES DISTRICT JUDGE STANLEY J. HARRIS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AT C.A. #87-01821 ON NOVEMBER 24, 1987 AND AFFIRMING HIS DENIAL OF RECONSIDERATION ON DECEMBER 23, 1987

(Received January 30, 1989)

CERTIFICATION OF SERVICE

On the 31st day of January, 1989, copy hand delivered to United States District Judge Stanley J. Harris at

his chambers in the United States Court House in Washington, D.C. and to the United States Attorney by leaving same at his office, 555 4th Street, N.W., Washington, D.C.

/s/ Allen N. Brunwasser
Allen N. Brunwasser

TO THE HONORABLE, THE CHIEF JUDGE AND THE ASSOCIATE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Jay Louis Gibson and Allen N. Brunwasser, Appellants, respectfully request reargument and rehearing and suggest rehearing and rehearing en banc, and in support of this request, aver as follows:

FACTS NECESSARY TO UNDERSTAND THIS PETITION

1. The Court of Appeals is respectfully requested to observe that this appeal is a companion case to #88-5002 and that Appellants have filed a petition for reargument and rehearing and a suggestion of rehearing and rehearing en banc on January 31, 1989 together with six appendix volumes containing all material on record in this Court to date.

2. The Court is also respectfully asked to observe that *both* Jay Louis Gibson and Allen N. Brunwasser are Appellants in this case and the notice of appeal clearly disclosing that *both* Jay Louis Gibson and Allen N. Brunwasser appealed is attached to the "Answer to show cause order issued February 12, 1988–" (see photo at end of that pleading which appears in Appendix #6, 81-a to 83-a, and appears in Appendix #1, OA-35 to 37).

A. The original petition, filed July 8, 1987 at C.A. #87-01821 in the District Court, was first assigned to United States District Judge Harold H. Greene and has been photographed as part of Appellants' answer to this Court's February 12, 1988 rule (see Appendix #6, 63-a to 80-a).

B. The said petition requested numerous avenues of relief which included "Petition for writ of habeas corpus, suppression of evidence, permission to have Allen N. Brunwasser, Esquire, admitted specially for this case, transfer of case to the United States District Court for the Western District of Pennsylvania at Pittsburgh, Pennsylvania under authority of F.R.Cr.P. 21(b) and 22, order that case not be presented to Grand Jury on scheduled July 14, 1987 presentation date, remand to Magistrate A. L. Burnette with directions to issue subpoenas and have full preliminary hearing and other relief including obtaining June 24, 1987 and June 29, 1987 Magistrate transcripts plus attendance of Paul Cutler at Magistrate hearing".

3. On November 16, 1987, Judge Harris held that a July 16, 1987 Grand Jury indictment mooted the July 8, 1987 civil petition "in major part" and, since it had been joined with the criminal case, dismissed it, "sua sponte" for the sole reason that it "is both extraordinary and troublesome from the standpoint of orderly filings" (Appendix #2, 12-a to 13-a).

A. Gibson then filed a timely "Motion for reconsideration, reargument, to amend the order and/or judgment and for F.R.Cr.P. 60(b) relief" (Appendix #2, 14-a to 19-a).

B. On November 24, 1987, Judge Harris denied that Motion (Appendix #2, 24-a to 29-a) and, for a good measure, sua sponte concluded "it must revoke the *pro hac vice* appearance of Allen N. Brunwasser" (Appendix #2, 24-a) and did so without even a previous warning or a hearing (Appendix #2, 29-a, 40-a).

(1) Appellants respectfully ask the Court of Appeals to read the discussion of Judge Harris in his "Memorandum Opinion" (Appendix #2, 24-a to 29-a) and

(2) Then find that Local Rule 104 (j) as amended October 6, 1987 forbids removal without "notice and after affording an opportunity to be heard" where an issue would be "adequate cause" (Appendix #2, 1-a).

C. Judge Harris' November 24, 1987 "Memorandum Opinion" did not even mention the pending motion for reconsideration which Jay Louis Gibson considers denied sub silento

(1) On December 23, 1987 Judge Harris did advise that the entire motion had been denied (Appendix #1, OA-2, N.2 and OA-3, Paragraph #4).

(2) The Opinion Foot Note #7 also advised Jay Louis Gibson and Allen N. Brunwasser that a lawyer's removal cannot be challenged by an interlocutory appeal (Appendix #2, 29-a, N.7).

D. *Both* Jay Louis Gibson and Allen N. Brunwasser filed a November 30, 1987 challenge (Appendix #2, 41-a to 56-a) to Judge Harris' November 24, 1987 Order and also requested Judge Harris be more specific as to exactly what Allen N. Brunwasser and Jay Louis

Gibson were allowed to do in the attorney-client area (Appendix #2, 55-a to 56-a).

(1) The Prosecutor formally opposed this November 30, 1987 Motion (Appendix #2, 93-a) for the reasons given in the November 24, 1987 Opinion.

(2) Attorney Jacobovitz, who had been ordered to continue (Appendix #2, 40-a) then moved to withdraw (Appendix #2, 95-a to 101-a).

(3) Jay Louis Gibson then requested "an evidentiary hearing" (Appendix #2, 102-a to 106-a).

E. On December 23, 1987, Judge Harris refused the November 30, 1987 Motion of *both* Jay Louis Gibson and Allen N. Brunwasser (Appendix #1, OA-1 to OA-6), advised that Local Rule 104 (j) was not a basis for what was done (Appendix #1, OA2, N.4), reaffirmed what he had done and concluded (Appendix #1, OA-6) "the civil action remains dismissed".

F. On December 30, 1987, Jay Louis Gibson filed a motion to recuse Judge Harris (Appendix #1, OA-7 to OA-20) and on the same day, *both* Jay Louis Gibson and Allen N. Brunwasser filed a notice of appeal (Appendix #1, OA-35 to OA-38; see also Prosecutor's answer to February 12, 1988 rule, Appendix #6, 82-a, N.4.

4. On February 12, 1988, mentioning only Jay Louis Gibson as "Appellant" the assigned Panel issued a rule on him to show cause why his appeal should not be dismissed because of *Deaver v. Seymour*, ___, 822 F.2d 166 (D.C. Cir. 1987).

A. A photo of this Order is attached to this petition.

B. On February 29, 1988, Jay Louis Gibson express mailed an answer which is photographed in Appendix #6, 57-a to 83-a and, inter alia, says in its Paragraph 5C "Gibson also respectfully asks the Panel to evaluate Paragraph 6 of the notice of appeal insofar as it impacts upon the right of himself and Allen N. Brunwasser to appeal both here and at #88-3005" (Paragraph 3 of the said appeal notice (Appendix #6, 81-a) specifically declares "Allen N. Brunwasser, Esquire, and Jay Louis Gibson appeal–".

5. On January 17, 1989, the assigned Panel affirmed the orders on appeal. A photo of this order is attached to this present petition.

CONCISE STATEMENT OF ISSUE AND ITS IMPORTANCE AND CITING UNITED STATES SUPREME COURT, THIS COURT AND OTHER FEDERAL COURTS IN CONFLICT WITH THE JANUARY 17, 1989 PANEL DECISION

A. Petitioners respectfully argue that the Sixth Amendment right to chosen counsel who, once admitted, cannot be removed without a previous hearing and just cause, the impositioning of local economic oriented trade barriers to favor local counsel and exclude out of town counsel, the right to a stenographer and subpoenas and non-hearsay evidence at a preliminary hearing, the constitutional right to challenge violation of these other rights by a civil habeas corpus which is an original – not part of the criminal case – remedy and the right to appeal from an adverse decision on the above are of sufficient exceptional importance to justify an immediate appeal especially when client and his removed attorney join.

B. Petitioners urge this distinguished Court of Appeals to evaluate whether affirming what Judge Harris has done and how he did it, especially when his very opinion (see Appendix #2, 29-a, N.7) opined his decision could not be immediately appealed, will result in future contra-criminal case Defendants arbitrary lower court rulings.

C. Petitioners respectfully suggest that the January 17, 1989 decision of the Adjudication Panel has directly overruled Washington v. Clemmer, 1964, D.C.C.A., 339 F.2d 315 which holds the exact opposite in re habeas corpus before conviction and the right to an immediate before conviction appeal.

D. Petitioners also urge the Court en banc to rule that the Adjudication Panel has not only misread and erroneously applied *Flanagan v. U.S.*, 1984, 465 US 259; *Deaver v. Seymour*, C.A.D.C., 1987, 822 F.2d 66; *Penson v. Ohio*, 1988, 57 U.S.L.W. 4020, 109 S. Ct. 346 and *Sunal v. Large*, 1947, 332 US 174, 67 S. Ct. 1588, but that those cases actually support Petitioners.

E. Petitioners also argue that the said January 17, 1989 decision has overruled the learning of *Fay v. Noia*, 1963, 83 S. Ct. 822, 372 US 391; *Davis v. U.S.*, 1974, 417 US 333, 94 S. Ct. 2298 and *Kaufmann v. U.S.*, 1969, 89 S. Ct. 1068, 394 US 217 for the reasons discussed, infra, in this petition.

F. Petitioners respectfully suggest resolution of the above issues by allowance of immediate appeal will aid the efficient administration of justice in this Circuit and should be decided now so as not to, by a procedural blockade, remove habeas corpus, advance notice and a

pre-decision hearing, the right to chosen counsel and habeas corpus from the federal constitution and relegate them from efficient protections to back shelf ineffective remedies.

G. Petitioners also respectfully suggest that if the United States Attorney agrees with the above, his duty is to so advise the court; *Leahy v. District of Columbia*, 1987, C.A.D.C., 833 F.2d 1046, 1049, N.5.

APPELLANTS' ARGUMENT IN SUPPORT OF THEIR PETITION FOR REARGUMENT, REHEARING AND SUGGESTION OF REHEARING AND REHEARING EN BANC

6. The January 17, 1989, Panel Order affirming Judge Harris' dismissal of Gibson's July 8, 1987 original petition, attached to this petition, relies on four cited cases so Appellants will here attempt to show why none of these four cases apply or were erroneously applied or misapprehended as to what each held.

SUNAL V. LARGE, 1947, 332 US 174, 179 AND N.11

7. *Washington v. Clemmer*, 1964, D.C.C.A., 339 F.2d 715 is a factual twin of Jay Louis Gibson, refused to apply *Sunal* and granted habeas corpus relief.

A. There, as here, a criminal defendant was refused at his preliminary hearing the right to a stenographer, the right to subpoenas and the right to be presented with eye-witnesses first hand evidence instead of hearsay.

B. After being bound over for trial but before trial or conviction, he brought habeas corpus which was denied by the District Court but reversed on appeal.

(1) The Appeal Court's supervisory power was used as authority and

(2) The case was remanded for a complete evidentiary hearing with a stenographer plus requested subpoenas and

(3) Jurisdiction was retained to monitor what was done in the District Court.

8. *Sunal* does not confine habeas corpus to "rare and unusual circumstances" as the Panel's January 17, 1989 order concludes:

A. The *Sunal* habeas corpus petitioner lost because he did not appeal his draft case when he could have and, after the time limit had run, tried to use habeas corpus as an alternative to appeal.

B. Even then, the opinion advised that if defendant had appealed and lost, there might be a different decision (332 US at 181, 676 S. Ct. at 1592).

C. The Supreme Court was concerned that allowance of this procedure would mean a case was never over and observed that only a procedural – not a constitutional right, which might be sufficient for habeas corpus was involved (id. at 182, 1593).

D. The Supreme Court concluded "When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined

thereunder may have recourse to habeas corpus to put an end to the restraint" (id. 184, 1593).

E. Petitioners were given no hearing by Judge Harris and respectfully argue that *Sunal* is authority for them rather than against them.

9. *Fay v. Noia*, 1963, 83 S. Ct. 822, 841, N.35, 372 US 391, 424, N.35 limits *Sunal* to "federal prisoners who did not appeal their convictions, could not be released on habeas corpus" especially when the issues are "not even of constitutional dimensions".

A. Fay also instructed that "the writ of habeas corpus is a new suit–" (id. 841/423, N.34) and

B. "The judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty not withstanding the act. It is not a proceeding in the original action" (id. N.34).

C. Jay Louis Gibson and Allen N. Brunwasser thus respectfully argue that this *new* proceeding should not be considered a part of the underlying criminal case and should have been decided on the merits below and also should be so decided here.

10. *Davis v. U.S.*, 1974, 417 US 333, 345, 94 S. Ct. 2298, 2304 advised that *Sunal* is limited to a case where habeas corpus is used to overcome a previous deliberate failure to take an available appeal and where no constitutional issues are involved and (94 S. Ct. at 2305, 417 US at 345-6) appears to confine it "to the particular considerations dispositive in that case" but says "where the need for the remedy afforded by the writ of habeas corpus is

apparent" such as a "fundamental defect which results in a complete miscarriage of justice", it will be granted.

11. *Kaufmann v. U.S.*, 1969, 89 S. Ct. 1068, 1072, 349 US 217, 223 not only confine *Sunal* to non-constitutional issues but also advises it is not like an appeal because–

A. "The function of habeas corpus is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest of allegations" and "–the power of inquiry on federal habeas corpus is plenary" and also advised

B. If the facts alleged were proved "would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew".

12. *Cameron v. Mullen*, 1967, C.A.D.C., 387 F.2d 193 affirmed District Court release by habeas corpus of a formerly acquitted by reason of insanity defendant who was then committed and held a pending appeal by defendant of her commitment to be no bar.

13. *Hilton v. Braunskill*, 1987, 107 S. Ct. 2113, 2118 and N.5, ___ US ___ and Note 5 advises that habeas corpus is a civil proceeding in which the court may fashion an appropriate remedy.

14. Petitioners thus respectfully urge the Court to reconsider and now rule that *Sunal* is no bar to habeas corpus relief and this relief is available to Jay Louis Gibson both before Judge Harris and here.

FLANAGAN V. UNITED STATES, 1984, 465 US 259, 269

15. Petitioners respectfully suggest that Flanagan is no bar because the decision applies only to an appeal by the client (as there) but not to the situation where the removed lawyer also appeals (as here) especially since the removed attorney's appeal will not disrupt the trial which problem was the main concern of the Flanagan court.

A. Petitioners respectfully suggest the Appeals Panel thought *only* Jay Louis Gibson had appealed and

B. Did not consider the impact of Brunwasser's appeal as explained in *Richardson-Merrill, Inc. v. Koiler,* 1985, 105 S. Ct. 2787, N.3, 472 US 479, N.3 (attorney can appeal his removal; client may be able to bring mandamus or take interlocutory appeal).

C. In fact, removal of counsel on non-residence grounds was considered on appeal in *Frazier v. Heebe,* 1987, ___ US ___, 107 S. Ct. 2607.

D. Apparently *both* client and his attorney must appeal or counsel will lose; *Law offices of Chase v. Federal Communications Commission,* March 25, 1988, D.C.C.A., 843 F.2d 517, 521.

(1) Judge Williams' discussion in his concurring opinion observes a permanent order of removal is appealable by counsel (853 F.2d at 524).

(2) Allen N. Brunwasser has been removed not only in this case but for good in the District of Columbia federal district court.

(3) If he would attempt representation in any other case, Judge Harris and all other District of Columbia Judges would obviously follow the removal decision on appeal here.

(4) Dissenting Judge Wald's opinion would probably allow the appeal due to reputation and loss of future fees problems (843 F.2d at 527).

PENSON V. OHIO, NOVEMBER 28, 1988, 57 U.S.L.W. 4020, 4023, 109 S. CT. 346, 352 (COUNSEL FILES ANDERS BRIEF AND IS ALLOWED TO WITHDRAW; FAILURE TO REPLACE HIM DURING APPEAL HELD ERROR)

16. Petitioners respectfully suggest *Penson's* ruling that lack of counsel is presumed prejudicial and cannot be considered harmless either at trial or on appeal is actually a finding in their favor.

DEAVER V. SEYMOUR, 1987, D.C. CIR., 822 F.2d 66, 70-71

17. *Deaver* did not involve habeas corpus or appeal but an attempt to use declaratory judgment and injunctive proceedings to appeal an interlocutory order.

A. Jay Louis Gibson has distinguished this case in his answer to this Court's February 12, 1988 rule (Appendix #6, 57-a to 83-a).

B. Jay Louis Gibson observes there that his request went far beyond what *Deaver* attempted and specifies why.

C. Petitioners respectfully urge the Court to evaluate this response to the February 12, 1988 rule and decree *Deaver* is no bar to this appeal especially when brought in tandem with the mandamus and considering that this is a *joint* appeal by *both* Allen N. Brunwasser and Jay Louis Gibson.

D. *Deaver* was told his failure to remove the government's choice of its lawyer would have to await an appeal if he were convicted.

(1) This is sort of what has happened to Jay Louis Gibson who has lost his lawyer of choice.

(2) However, Petitioners respectfully suggest the free choice of counsel by a defendant subject to 20 years imprisonment is many times more vital than whom the government, with its vast resources and wide area of selection can choose, especially when the local United States Attorney's Office and the United States Department of Justice are well staffed with experienced prosecutors (i.e., the prosecution case will be properly presented regardless of who does it whereas the function of defense counsel is different and talent varies).

(3) Although the prosecutor filed no formal motions to remove Allen N. Brunwasser, it did not object to this rule entered at the #88-5002 mandamus (Appendix #6, 1-a to 54-a).

(4) The *Deaver's* Court also qualified its decision by a requirement of good faith and lack of "chill" factors which may be present for Jay Louis Gibson which are not factors evaluated by the Adjudication Panel.

(5) Since declaratory judgment requests a decision on complete merits and injunctive relief requires balancing of prejudice plus likelihood of victory, Petitioners respectfully suggest these remedies are not similar to the functions of habeas corpus which is a constitutional right as opposed to the *Deaver* remedies which are civil rules of procedure creations.

(6) *In Re Sealed Case, D.C.C.A.*, 1987, 829 F.2d 50, 53 qualified *Deaver* by advising the appointment of Special Counsel could be raised if Colonel North was indicted, but even there, Judge Williams would allow the appeal before indictment (829 F.2d at 63).

(7) Allen N. Brunwasser has been barred from practice in the lower court.

a. If he would obtain a new client, the bar would probably be given collateral respect by the entire bench.

b. The issue of removal is one of pure law and ripe for immediate decision; *International Brotherhood of Electrical Workers v. I.C.C.*, November 25, 1988, C.A.D.C., 862 F.2d 230, 234.

CONCLUSION

Petitioner-Appellants respectfully urge reargument, rehearing and rehearing en banc be granted.

Respectfully Submitted,

Jay Louis Gibson

/s/ Allen N. Brunwasser
Allen N. Brunwasser

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5023 **September Term, 1987**

CA 87-01821

Jay L. Gibson, United States
of America, ex rel,

Appellant

v.

Darren Wolpert

BEFORE: Robinson, Silberman, and Williams
Circuit Judges

ORDER

(Filed February 12, 1988)

Upon taking judicial notice of the petition for writ of mandamus filed in *In re Gibson and Brunwasser,* No. 88-5002, the record in *United States v. Gibson,* Crim. No. 87-00311, and the records in *United States v. Gibson,* No. 87-3083 and *In re Gibson and Brunwasser,* No. 87-5309, it is

ORDERED by the court that Appellant show cause within twenty-one days of the date of this order why the order of the district court dismissing this case should not be affirmed on the ground that the habeas corpus petition constitutes an impermissible preemptive attack on pending criminal charges. *Deaver v. Seymour,* 822 F.2d 66 (D.C. Cir. 1987).

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5023 **September Term, 1988**

C.A. No. 87-01821

Jay L. Gibson,
United States of America, ex rel.,

Appellant

v.

Darren Wolpert

BEFORE: Robinson, Silberman, and Williams
Circuit Judges

ORDER

(Filed January 17, 1989)

Upon consideration of appellant's response to the order to show cause and the record herein, and taking judicial notice of the record in *In re Gibson and Brunwasser,* No. 88-5002 (D.C. Cir. *docketed* January 5, 1988), it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the order dismissing the case, filed by the district court on November 24, 1987, and the order denying reconsideration, filed by the district court on December 23, 1987, be affirmed. Orders disqualifying defendant's counsel in a criminal proceeding cannot be the subject of an interlocutory appeal. *See Flanagan v. United States,* 465 U.S. 259, 269 (1984). Accordingly, this court will review the errors claimed in this criminal case on appeal after conviction. *See Deaver v. Seymour,* 822 F.2d 66, 70-71 (D.C. Cir. 1987); *cf. Penson v.*

Ohio, 57 U.S.L.W. 4020, 4023 (Nov. 29, 1988). Habeas corpus relief prior to conviction may be granted only in rare and unusual circumstances. *See Sunal v. Large*, 332 U.S. 174, 179 & n.11 (1947).

The Clerk is directed to issue forthwith a certified copy of this order to the district court in lieu of formal mandate.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5002 **September Term, 1988**

CR-87-322 & CA-87-1821

IN RE:
Jay Louis Gibson and
Allen N. Brunwasser

Petitioners

BEFORE: Robinson, Silberman, and Williams,
Circuit Judges

ORDER

(Filed March 15, 1989)

Upon consideration of petitioners' petition for rehearing, filed January 30, 1989, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5002 September Term, 1988

CR-87-322 & CA-87-1821

IN RE:
Jay Louis Gibson and
Allen N. Brunwasser

Petitioners

BEFORE: Wald, Chief Judge, Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

(Filed March 15, 1989)

Petitioners' Suggestion For Rehearing *En Banc* has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5023 September Term, 1988

CA 87-01821

Jay L. Gibson, United States of America, ex rel,

Appellant

v.

Darren Wolpert

BEFORE: Robinson, Silberman and Williams, Circuit Judges

ORDER

(Filed March 15, 1989)

Upon consideration of appellant's petition for rehearing, filed January 30, 1989, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5023 September Term, 1988

CA 87-01821

Jay L. Gibson, United States of America, ex rel,

Appellant

v.

Darren Wolpert

BEFORE: Wald, Chief Judge, Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

(Filed March 15, 1989)

Appellant's Suggestion For Rehearing *En Banc* has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

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(2)

No. 88-1894

Supreme Court, U.S.
FILED
AUG 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAY LOUIS GIBSON AND ALLEN N. BRUNWASSER,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

8 pp

QUESTION PRESENTED

Whether the trial court's removal of petitioner Gibson's out-of-state attorney prior to trial is subject to interlocutory appellate review via either mandamus or habeas corpus, when petitioner Gibson has not yet been tried.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1894

JAY LOUIS GIBSON AND ALLEN N. BRUNWASSER,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying petitioners' mandamus petition (Pet. App. 18A) and the order of the court of appeals affirming the dismissal of petitioner Gibson's habeas corpus petition (Pet. App. 36A-37A) are not yet reported.

JURISDICTION

The judgment of the court of appeals in both cases was entered on January 17, 1989. Petitions for rehearing were denied on March 15, 1989 (Pet. App. 39A). The petition

for a writ of certiorari was filed on May 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 16, 1987, petitioner Gibson was indicted by a grand jury sitting in the District of Columbia. The indictment charged him with one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Gibson retained an out-of-state lawyer—petitioner Brunwasser—and local counsel to represent him. On November 24, 1987, prior to trial, the district court withdrew its permission for Brunwasser to appear pro hac vice and precluded Brunwasser from representing petitioner. Thereafter, petitioner and Brunwasser filed a petition for a writ of mandamus in the court of appeals. The petition challeged the district court's removal of Brunwasser. At the same time, petitioner Gibson filed a habeas corpus action in the district court raising the same issue. The district court denied that petition, and Gibson appealed.

The court of appeals denied the mandamus petition on the ground that mandamus was not an appropriate remedy. The court held that petitioners did not have a clear right to relief, that the district court had no nondiscretionary duty to honor that right, and that an otherwise adequate remedy was available. Pet. App. 18A. The court of appeals also affirmed the dismissal of Gibson's habeas corpus action. Relying on this Court's decision in *Flanagan* v. *United States,* 465 U.S. 259 (1984), the court held that "[o]rders disqualifying defendant's counsel in a criminal proceeding cannot be the subject of an interlocutory appeal. * * * Accordingly, this court will

review the errors claimed in this criminal case on appeal after conviction." Pet. App. 36A.*

ARGUMENT

Petitioners contend (Pet. 15-22) that the court of appeals should have allowed them to challenge prior to trial—either by way of mandamus or habeas corpus—the removal of Brunwasser as Gibson's lawyer. Contrary to that claim, the court of appeals correctly held that post-conviction review would be adequate to challenge the propriety of the district court's ruling concerning Brunwasser.

In *Flanagan* v. *United States,* 465 U.S. at 266-270, the Court held that the disqualification of a defendant's lawyer is not subject to interlocutory review. As the court of appeals recognized (Pet. App. 36A), *Flanagan* bars pretrial review of Gibson's claim that the district court erroneously removed Brunwasser. *Flanagan* requires that Gibson await the direct appeal from his conviction before he can challenge the removal of Brunwasser as his lawyer. Of course, should Gibson be acquitted at trial, the entire issue will become moot.

Contrary to petitioners' claim (Pet. 20), the fact that Brunswasser also appealed his disqualification is of no moment. In *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 440-441 (1985), the Court extended *Flanagan*'s holding to civil cases. The Court also observed that a disqualified attorney's "desire for vindication" does not provide a basis for interlocutory review. *Id.* at 434-435. Indeed, it has been held that a disqualified attorney never has the right to judicial review of the disqualification order. *Law Offices of Seymour M. Chase, P.C.* v. *FCC*,

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* Petitioner Gibson has not yet been tried. We have been informed by the United States Attorney's Office that Gibson's trial has been stayed pending the resolution of this petition.

843 F.2d 517, 521 (D.C. Cir. 1988); *id.* at 522-523 (Williams, J., concurring). Consequently, Brunwasser's participation in the case does not affect the correctness of the court of the appeals' holding.

Nor can petitioner Gibson escape the rule in *Flanagan* by styling his action as a petition for habeas corpus. This Court observed in *Sunal* v. *Large*, 332 U.S. 174, 179 (1947), that habeas corpus relief is not available when there is an appellate remedy for the claimed error. Moreover, "[t]he rule is even more strict" when habeas corpus is sought prior to trial. *Id.* at 179 n.11. Since Gibson has an adequate remedy on direct appellate review of any conviction that might result after he is tried, he is not entitled to habeas corpus relief.

Petitioners are incorrect in their contention that *Fuller* v. *Diesslin*, 868 F.2d 604 (3d Cir. 1989), conflicts with the decision below. In that case the defendant had already been convicted and had exhausted his state appellate remedies before challenging on habeas corpus the pretrial disqualification of his attorney. *Id.* at 605. *Fuller* is therefore in accord with the final judgment rule of *Flanagan* and the rulings of the courts below.

CONCLUSION

The petition of a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
*Acting Solicitor General**
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
LOUIS M. FISCHER
Attorney

AUGUST 1989

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* The Solicitor General is disqualified in this case.

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